

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ERNEST R. MAINE</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,038,297
<b>DEERE AND COMPANY</b>	)	
Respondent	)	
AND	)	
	)	
<b>NEW HAMPSHIRE INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

The parties appealed the October 12, 2009 Award entered by Administrative Law Judge Thomas Klein. The Workers Compensation Board heard oral argument on January 20, 2010.

**APPEARANCES**

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Samantha N. Benjamin-House of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award.

**ISSUES**

This is a claim for an accident occurring on or about December 7, 2007, and resulting injury. In the October 12, 2009, Award, ALJ Klein awarded claimant permanent

disability benefits for a 4 percent whole body functional impairment. The ALJ wrote, in part:

The Court finds as Dr. Do concluded that the nature and extent of Claimant's injuries include a temporary aggravation of his preexisting neck condition. The Court therefore discounts the ratings of the two physicians to the cervical spine and ulnar nerve problems. The Court finds both physicians[] ratings for the shoulder to be reasonable and credible and balances Dr. Do's 1% rating and Dr. Prostic's 7.3% rating and finds that the Claimant has suffered a 4% whole body impairment and issues an award on that basis.<sup>1</sup>

Claimant contends ALJ Klein erred. Claimant asserts Dr. Pat D. Do lacks credibility in this claim and the only credible physician to testify is Dr. Edward J. Prostic, who opined claimant sustained injury to his neck and left shoulder and that claimant has a 14 percent whole body impairment as a result of the December 7, 2007 accident. Claimant requests the Board to modify the October 12, 2009 Award and grant him permanent disability benefits for a 14 percent whole body functional impairment.

Respondent also contends the ALJ erred. Respondent maintains the ALJ erred in awarding claimant permanent disability benefits for a 4 percent whole body impairment. Respondent contends claimant has sustained injury and functional impairment only to the left upper extremity at the level of the shoulder as a result of the December 7, 2007 accident and that impairment is a 1 percent impairment to the left upper extremity as opined by Dr. Do. Respondent argues Dr. Prostic's ratings are not reliable and should be disregarded. Regarding the alleged neck injury in this claim, respondent argues claimant had a preexisting cervical spine condition and that claimant has not sustained any additional impairment to his neck related to the December 7, 2007 accident. Respondent requests the Board to modify the Award and base claimant's award of permanent disability benefits upon a 1 percent impairment to the left upper extremity for his shoulder injury.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's impairment?
2. Are the medical records of Dr. Fesler and Dr. Sherburn admissible?

---

<sup>1</sup> ALJ Award (Oct. 12, 2009) at 3.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

On December 7, 2007, claimant was working as a machinist for respondent. On that date, the claimant was trying to open a stuck door when he felt a pulling in his shoulder and neck. Claimant reported this accident and was taken to Coffeyville Regional Medical Center. X-rays were taken and claimant was provided a sling and medication.

Claimant was then seen by the company physician, who ordered an MRI. The MRI showed evidence of an incomplete rotator cuff tear. Claimant then received treatment of steroid injections and physical therapy from orthopedic surgeon Dr. Tracy Painter. Claimant ultimately came under the care of Dr. Pat D. Do.

Dr. Do, a board-certified orthopedic surgeon, first saw the claimant for evaluation and treatment of left shoulder complaints on April 22, 2008. The left shoulder was the claimant's primary pain complaint at that time. Dr. Do's notes of the April 22, 2008 visit do not reflect that claimant complained of neck problems on that date. However, the medical history form claimant completed on April 22, 2008, for Dr. Do states: "What body part are we treating? left shoulder/neck."<sup>2</sup> Claimant underwent left shoulder arthroscopic surgery with Dr. Do to repair a small partial thickness rotator cuff tear on May 5, 2008.

Claimant had two follow-up visits with Dr. Do – May 19 and June 17, 2008. Dr. Do's chart notation from June 17, 2008, reflects claimant mentioned headaches and some neck pain.

This is not the first time claimant has had problems regarding his neck. In 2004, claimant saw Dr. W. F. Fesler for back, arm and upper back pain. Dr. Fesler's assessment was cervical and thoracic strain. As treatment, Dr. Fesler prescribed a muscle relaxant and pain medication.

In May 2006, claimant sustained an injury to his neck. The injury was caused by claimant lifting an 80-pound part while working for respondent. Claimant sought treatment for that injury from Dr. Eric W. Sherburn. Dr. Sherburn diagnosed cervical radiculopathy and recommended an MRI. The MRI revealed loss of disc spacing with subligamentary disc herniation at C5-C6, and to a lesser degree near the left C4-C5 neural foramen. Claimant then underwent a cervical discogram and post cervical discogram CT scan. Dr. Sherburn

---

<sup>2</sup> Do Depo., Ex. 14.

recommended physical therapy with a focus on myofascial release and massage as treatment.

Dr. Do placed claimant at maximum medical improvement on September 25, 2008. On October 24, 2008, Dr. Do opined that claimant had a 1 percent upper extremity impairment for the left shoulder and a 3 percent whole body impairment for the neck pursuant to the *AMA Guides*.<sup>3</sup>

At the request of his attorney, claimant saw Dr. Edward J. Prostic on November 5, 2008. The doctor opined claimant had a 14 percent permanent partial impairment to the body as a whole, combining an 8 percent whole body impairment for his cervical spine and ulnar nerve problem and a 12 percent upper extremity impairment (or an approximate 7 percent whole body impairment) for the left shoulder.

At the time Dr. Do and Dr. Prostic gave the ratings mentioned above, they were unaware of claimant's 2004 and 2006 neck conditions and treatment. Although claimant asserts respondent intentionally withheld the records of Dr. Fesler and Dr. Sherburn from Dr. Do, the evidence does not support that assertion. Rather, the Board finds miscommunication explains the omission. It must be noted that neither physician was aware of claimant's prior neck conditions and treatments.

The medical records of Dr. Fesler and Dr. Sherburn were ultimately provided to and reviewed by Dr. Do. Based on these medical records, Dr. Do revised his October 2008 rating on August 12, 2009. The doctor opined that claimant had a temporary aggravation of his preexisting neck condition and consequently sustained no permanent partial impairment to his cervical spine related to his December 7, 2007 accident. The 1 percent upper extremity impairment for the shoulder remained unchanged.

Dr. Prostic opined the information related to claimant's neck conditions prior to the December 7, 2007 work injury would affect his opinion regarding claimant's preexisting status but would not change the ratings he provided in November 2008.

The ALJ found the claimant suffered a 4 percent whole body impairment. In arriving at this finding the ALJ discounted the ratings of the two physicians for the cervical spine and ulnar nerve problems. The ALJ found both physicians' ratings for the shoulder reasonable and credible and balanced Dr. Do's 1 percent rating and Dr. Prostic's approximate 7 percent rating to conclude claimant suffered a 4 percent whole body impairment.

---

<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

The claimant asserts the ALJ erred in relying on the revised ratings of Dr. Do. He contends the medical records of Dr. Sherburn and Dr. Fesler are medical hearsay and inadmissible. Claimant maintains Dr. Do's revised ratings are, in part, based on the medical records of Dr. Fesler and Dr. Sherburn and should not be considered. In support of his position, claimant cites K.S.A. 44-519.

K.S.A. 44-519 states:

Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

The Kansas Court of Appeals in *Boeing*<sup>4</sup> stated:

K.S.A. 44-519 does not prevent a testifying physician from considering medical evidence generated by other absent physicians as long as the testifying physician is expressing his or her own opinion rather than the opinion of the absent physician.

The Kansas Supreme Court in *Roberts*<sup>5</sup> adopted the reasoning of the *Boeing* Court:

The holding of *Boeing* that most applies to the present case is best expressed in syllabus ¶ 3: "K.S.A. 44-519 does not prevent a testifying physician from considering medical evidence generated by other absent physicians *as long as* the testifying physician is expressing his or her own opinion rather than the opinion of the absent physician." (Emphasis added.)

Relying on the analysis in *Boeing* and *Roberts*, the Board finds that Dr. Do can consider the medical records of Dr. Fesler and Dr. Sherburn in forming his medical opinion and, therefore, his revised ratings are admissible. When Dr. Do issued his revised ratings on August 12, 2009, he was rendering his own opinion, not the opinions of Dr. Fesler or Dr. Sherburn. The Board adopts the August 12, 2009 ratings of Dr. Do.

---

<sup>4</sup> *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, Syl. ¶ 3, 764 P.2d 462 (1988), rev. denied 244 Kan. 736 (1989).

<sup>5</sup> *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 279, 949 P.2d 613 (1997).

Dr. Do was claimant's treating physician, who performed surgery and saw claimant many times. Consequently, his opinion regarding claimant's preexisting neck condition is more credible than that of Dr. Prostic.

Both physicians' ratings for the shoulder are equally credible. Accordingly, the Board averages Dr. Do's 1 percent rating and Dr. Prostic's 12 percent rating and finds and concludes the claimant suffered a 6.5 percent impairment to his left upper extremity at the shoulder level.

The Board modifies the ALJ's Award and finds claimant has sustained a 6.5 percent impairment to his left upper extremity at the shoulder level and that claimant is entitled to receive permanent disability benefits under K.S.A. 44-510d for that impairment. The Award is affirmed in all other regards.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>6</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, the Board modifies the October 12, 2009 Award entered by ALJ Klein.

Ernest R. Maine is granted compensation from Deere and Company and its insurance carrier for a December 7, 2007 accident and resulting disability. Based upon an average weekly wage of \$1,279.51, Mr. Maine is entitled to receive 14.63 weeks of permanent partial disability benefits at \$510 per week, or \$7,461.30, for a 6.5 percent permanent partial disability, making a total award of \$7,461.30, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

---

<sup>6</sup> K.S.A. 2009 Supp. 44-555c(k).

Dated this \_\_\_\_ day of March, 2010.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Samantha N. Benjamin-House, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge